

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RICARTE A. SOLIBEN,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

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Vet. App. No. 14-3240

APPELLANT'S MOTION TO STRIKE THE SECRETARY'S RESPONSE TO THE COURT'S ORDER OF MAY 24, 2016

Appellant Ricarte A. Soliben hereby moves the Court, pursuant to Rule 27, to strike the Secretary's Response to this Court's Order of May 24, 2016. The Court should do this for two reasons. First, the Secretary provided the wrong statistics. The Court asked for the average time it took the Board to resend a decision after being notified by the veteran. Instead, the Secretary lumped those statistics in with an unknown number of cases involving mail returned as undeliverable by the Post Office—a different situation governed by different policies. Second, the Secretary concedes there were no applicable regulations or procedures during the relevant period, which means there is nothing more for the Court to consider now. Thus, the Court should strike the Secretary's filing and render a decision based on the briefs and argument as of May 11, 2016.

FACTUAL BACKGROUND

By way of background, in July 2014, Mr. Soliben notified the Board that he had not received its decision. *See* Appellant's Brief in Support of Equitable Tolling, No. 14-3240, at **2-3 (Vet.App. Nov. 30, 2015). But the Board waited 42 days to resend a copy, which arrived

less than a week before the deadline to appeal, and thus caused Mr. Soliben to miss that deadline by a single day. This 42-day delay was significantly longer than the time it took the Board to respond to similar requests. *See, e.g., Toomer v. McDonald*, 783 F.3d 1229, 1231 (Fed. Cir. 2015) (noting that the Board, after being contacted by the veteran, re-sent its decision to the new address within eight days).

At the close of oral argument on May 11, 2016, the Court directed the Secretary to (1) confirm whether VA had any regulations, rules, policies, or procedures in place regarding the Board's process for responding to "an appellant who notifies the Board that a copy of its decision has not been received due to a change in address" and personally "requests a copy of that Board decision"; (2) whether the Board had a target response time in such situations; and (3) the average time it actually took for the Board to respond for the period of May 1, 2014 to September 30, 2014. The Court repeated that request in the form of a written order. *See Per Curiam Order*, No. 14-3240 (Vet. App. May 24, 2016) ("Order"). At no time did the Court inquire about mail that had been returned to the Board as undeliverable.

On June 23, 2016, the Secretary filed his response. *See Appellee's Response to the Court's May 24, 2016, Order*, No. 14-3240 (Vet.App. June 23, 2016) ("Response"). The Secretary concedes that the Board did *not* have a policy regarding the handling of requests to resend a Board decision and did *not* have a target response time for this type of situation in 2014. *Id.* at **2-3. The Secretary then advises the Court that, in 1,349 instances during the relevant period where the Board re-sent a decision, the average response time was 34.6 days. *Id.* at *4. That sample includes, however, instances where a decision was returned to the Board by the U.S. Postal Service as undeliverable. *Id.* at *4-5. The Secretary does not say how many of the 1,349

cases were situations where a decision was re-sent based on a request from a veteran versus how many were situations where mail was returned as undeliverable.

ARGUMENT

The Court should strike the Secretary's response for two reasons:

First, the Secretary provided the wrong statistics. The Court asked for the average response time, from May 1, 2014 through September 30, 2014, in situations like Mr. Soliben's—where an "*appellant*...notifies the Board that a copy of its decision has not been received due to a change in address." *See* Order, at *1 (emphasis added). Instead, the Secretary provided an average (34.6 days) based on an entirely different sample: cases where a veteran asked that a decision be re-sent *and* cases where a decision was returned as undeliverable. *See* Response, at **3-4. In other words, the Secretary threw in numbers that likely skew the average and gave the Court no way to parse them out.

The Secretary himself recognizes that the two situations (*i.e.*, resending in response to a request versus resending after a decision is returned as undeliverable) are distinct. The Board had a procedure in place for dealing with *undeliverable* mail. *See* Response, at *2 ("Pursuant to the Chairman's Memorandum 01 06-09, paragraph 8, if a Board decision is returned as undeliverable, the Board staff must..."). The Secretary admits that there were no procedures in place for dealing with a veteran's request to resend a decision. *Id.* ("Although the Chairman's Memorandum 01 06-09 directly addresses a situation where the mail is returned as undeliverable, these guidelines do not directly address a situation where mail to an appellant is not returned as undeliverable."). Given the acknowledged distinction between the two situations, lumping them together when calculating an average is suspect. And the fact that the true number cannot be

parsed out of the data the Secretary provides leaves the Court with nothing on which to base its decision.

Second, the Secretary cannot point to a controlling regulation or target date for the Court to consider. *See* Response, at *2 (“[The offered guidelines] do not directly address a situation where mail to an appellant is not returned as undeliverable.”); *see also id.* at *4 (“[T]he Board did not have a target time frame in which to respond to requests to send a Board decision to a newly received address from May 1, 2014 to September 30, 2014.”) (citing the Declaration of Barbara C. Morton)). Because there were no regulations or targets to guide the Board’s response then, there are none for this Court to consider now.

CONCLUSION

For the reasons set forth above and elsewhere in the pleadings and papers on file in this matter, Mr. Soliben moves the Court to strike the Secretary’s Response, and toll the deadline for filing his Notice of Appeal.

Respectfully submitted this 30th day of June 2016.¹

/s/ Benjamin J. Wolinsky
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¹ On June 30, 2016, the undersigned counsel conferred with counsel for the Secretary. The Secretary is opposed to this Motion, and does not take a position at this time on whether he will file a response in opposition.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on June 30, 2016, the foregoing **APPELLANT'S MOTION TO STRIKE THE SECRETARY'S RESPONSE TO THE COURT'S ORDER OF MAY 24, 2016**, in the matter of *Soliben v. McDonald*, Docket Number 14-3240, was served on counsel of record via the Court's ECF system and mailed, U.S. First Class Mail, postage prepaid, to:

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